Supreme Court, U.S.
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No. 03-1288

IN THE

Supreme Court of the United States

ROBERT HOLMES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

I. Whether a decision of the Benefits Review Board, issued subsequent to its adverse affirmance by operation of law, is effective to toll the time for filing a petition for review to the circuit court of appeals where there was no timely motion for reconsideration filed pursuant to 20 C.F.R. § 802.407?

II. Whether a petition for review to the circuit court of appeals, which was filed more than thirty (30) days late, was timely filed?

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STATEMENT

Rule 15 of the Supreme Court Rules requires that a brief in opposition to a petition for a writ of certiorari "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. Rule 15. Pursuant to such obligation, Respondent, Virginia International Terminals ("VIT" or "Respondent") states as follows:

In his Statement of the Case, Petitioner, Robert Holmes ("Holmes" or "Petitioner"), alleged that both his Motion for Reconsideration to the Benefits Review Board ("BRB" or "Board") and his Petition for Review to the Fourth Circuit Court of Appeals were "timely." (Pet 4.) To the contrary, both the Motion and the Petition were in fact untimely.

Pursuant to 20 C.F.R. § 802.407, any party in interest may file a request for reconsideration of a Board decision within 30 days from the filing of that decision. By operation of law, the decision of the Administrative Law Judge ("ALJ") was deemed affirmed as of March 7, 2001. In order for Holmes' Motion for Reconsideration to be considered timely, it was required to be filed by April 6, 2001. Holmes did not file his Motion for Reconsideration until April 9, 2001. Accordingly his Motion for Reconsideration was not timely.

Pursuant to 3 U.S.C. § 921(c), Holmes was required to file his Petition for Review within 60 days of March 7, 2001, the date of affirmation by operation of law of the ALJ's decision, or by May 6, 2001. He did

not. His Petition for Review was filed on June 8, 2001. Therefore, it was not timely.

REASONS FOR DENYING THE WRIT

This court should leave undisturbed, by denying certiorari, the decision below of the Fourth Circuit Court of Appeals. This Court has stated that it will not grant a writ of certiorari except in cases where there is a true conflict of opinion and authority between the circuit courts of appeal, and in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L. Ed. 712, 43 S. Ct. 422 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955); *see also* Sup. Ct. Rule 10 (reasons to grant certiorari are limited to cases involving a conflict among the circuits, a conflict with the decisions of this Court, or an important question of law). As no applicable circumstances are present in the instant case, Petitioner's writ of certiorari should be denied.

I. THERE IS, IN FACT, NO CONFLICT BETWEEN THE FOURTH AND NINTH CIRCUITS ON THE ISSUE PRESENTED IN THIS CASE.

Petitioner argues that the Fourth Circuit's decision directly conflicts with the decision of the Ninth Circuit in *Ramey v. Stevedoring Servs. Of Amer.*, 134 F.3d 954 (9th Cir. 1998). This contention is incorrect.

A. THE DECISION BELOW BY THE FOURTH CIRCUIT IS UNPUBLISHED, AND THUS NOT A PRECEDENTIAL DECISION; THUS THERE IS NO VALID CIRCUIT SPLIT.

Both the Opinion of the Fourth Circuit entered June 12, 2003 and the Order of the Fourth Circuit entered on December 9, 2003 were unpublished decisions. As a result, these cases have little, if any precedential value, even within the Fourth Circuit. *See* 4th Cir. R. 36(c) (court will not cite an unpublished disposition absent unusual circumstances, and citation by parties is disfavored).

Because there is no precedential impact of these unreported decisions, they can have no effect on the outcome of cases in any circuit, including the Fourth Circuit. An opinion that has no precedential value cannot create a conflict among the circuits. Accordingly, the Respondent respectfully requests that Petitioner's petition for writ of certiorari be denied.

B. THE DECISION BELOW BY THE FOURTH CIRCUIT IS FACTUALLY DISTINGUISHABLE FROM THE NINTH CIRCUIT'S OPINION IN *RAMEY*; THUS THERE IS NO VALID CIRCUIT SPLIT.

The present situation is factually inconsistent, and thus, distinguishable, from that in *Ramey*. This Court has held that a petition for a writ of certiorari

should be denied where the asserted conflict in decisions, purportedly resulting in a circuit split, arose from a "difference in states of fact, and not in application of a principle of law." *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813, 75 L. Ed. 728, 51 S. Ct. 214 (1931).

In *Ramey*, the Ninth Circuit held that a petitioner may file a motion for reconsideration of BRB decisions affirmed by operation of law pursuant to Public Law 106-554, and that such motion may toll the 60-day period for filing petitions for review of courts of appeal. *Ramey*, 134 F.3d at 958-959. However, the petitioners in that case had filed *timely* motions for reconsideration. The Fourth Circuit correctly found that Holmes' motion for reconsideration was untimely and could thus not operate to toll the running of the statute of limitations for filing his petition for review with the Fourth Circuit. The Fourth Circuit did not address the issue of whether a *timely* filed motion for reconsideration would toll the 60-day appeal period where the ALJ decision was affirmed by operation of law pursuant to Public Law 106-554. Rather, it applied significantly divergent facts to determine whether a timely petition for review had been filed.

Because there is merely a difference in the factual situations, not in the application of a principle of law, it cannot be concluded that there exists a valid circuit split worthy of review by this Court and the petition for writ of certiorari should be denied.

II. EVEN IF THE COURT WERE TO ADDRESS THE QUESTION PRESENTED AS STATED BY THE PETITIONER, THE OUTCOME OF THE CASE WOULD BE THE SAME, REGARDLESS OF HOW THE CONFLICT IS RESOLVED.

This case represents a poor vehicle for resolving any potential conflict with prior decisions of this Court or other circuits because the issue of whether an opinion on reconsideration by the Board after the automatic affirmation by operation of law of an ALJ decision can alter the limitation period for seeking circuit court review is moot in this case. Review by this Court of such question presented would not yield a different result than that reached by the Fourth Circuit because the Petitioner failed to meet the limitations period for filing a motion for reconsideration with the Board.

Even if this Court were to find that an opinion on reconsideration by the Board, filed subsequent to the affirmation by operation of law of an ALJ opinion, can toll the limitations period for filing a petition for review to the circuit court, as suggested by the Petitioner, this particular petition for review by the Fourth Circuit would still be dismissed prior to reaching the substantive merits of the claim. Petitioner's motion for reconsideration by the BRB was not filed within 30 days of the final decision by operation of law, as required by 20 C.F.R. § 802.407. Thus, in this case, there was no valid decision on reconsideration to toll the limitations period.

Accordingly, the petition for writ of certiorari should be denied because the outcome of the questions

presented would have no effect on the results rendered in this case.

CONCLUSION

For the foregoing reasons, Holmes' petition for writ of certiorari should be denied.

Respectfully submitted,

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